Testimony of
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Public Hearing on:
B15-1073, Electronic Recording Procedures Act of 2004
B15-1071, Eyewitness Identification Procedure Act of 2004

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Good afternoon. My name is Robert J. Spagnoletti and I am the Attorney General for the District of Columbia. I want to thank Chairperson Patterson and members of the Committee for the opportunity to testify on this legislation.

I would first like to comment on B15-1073 the Electronic Recording Procedures Act of 2004. This Bill would require MPD to electronically record interrogations of persons suspected of committing certain dangerous and violent crimes, when such interrogations take place in police interview rooms. The Bill would also create an extra-Constitutional rebuttable presumption that a statement which was taken in violation of the Act was involuntary. If the government failed to overcome this presumption by clear and convincing evidence, the statement would be inadmissible.

Although the Office of the Attorney General supports the policy of electronically recording statements made by persons in custody when it is feasible to do so, we believe that this policy should be implemented by an MPD general order as a preferred practice, and not legislated. Moreover, we strongly oppose legislation, such as this, which would impose a presumption of unconstitutionality and a burden of proof to overcome that presumption which is higher than required by the United States Constitution.

Section 103 of the Bill would establish a rebuttable presumption that any statement that is taken in violation of Section 2 would be subject to a rebuttable presumption that the statement was involuntary. In order to overcome this presumption, the government would have to prove by clear and convincing evidence that the statement was voluntarily given. First, this misapplies the well-founded Constitutional notion of voluntariness. Second, this unjustifiably creates a legal presumption that is not founded in American Constitutional law. Third, this unnecessarily imposes a higher burden of proof for the government than is required by the Constitution.

I will begin with the issue of voluntariness. Section 103 of the bill creates a legal presumption that a statement which is not recorded as required is involuntary. Under Constitutional law, such a statement is then generally inadmissible against the defendant.[1] There are two ways in which the issue of voluntariness comes up in the Constitutional law governing statements against penal interest. First, if a defendant was subject to custodial interrogation, he is entitled to be advised of his *Miranda*[2] rights in order for the prosecution to use any statements against him in its case-in-chief. Among those rights is, of course, the right to remain silent. A defendant who was read his rights and waived them, may challenge that waiver as involuntarily. The second way in which voluntariness may be raised would be for the defendant to assert that the statement itself was taken under circumstances that were coercive,

[1] This rule, called the exclusionary rule, evolved in order to ensure that the prosecution could not benefit from statements taken in violation of a defendant's Fifth Amendment rights. *See Brown v. Mississippi*, 297 U.S. 278 (1936) (Fifth Amendment Due Process Clause protects defendants from use of coerced confessional against them); *Miranda v. United States*, 384 U.S. 436 (1966) (Fifth Amendment privilege against self incrimination protects defendants from the use of statements made during custodial interrogation, unless a voluntary and knowing waiver of the privilege is obtained).

[2] *Miranda v. United States*, 384 U.S. 436 (1966).

thus in violation of his right to due process.[3] Under both applications, the issue if voluntariness is based on the notion that a defendant's free will has been overcome by some measure of coercion. As such, when Section 103 of the Bill renders a statement that is not recorded as involuntary, it misapplies this Constitutional principle and renders the statement presumptively inadmissible on the basis of a misapplication of Constitutional law. While there is a tremendous body of caselaw that guides our Judges everyday in deciding what is and is not coercive, I am not aware of any court which has found that the failure to record an interrogation is itself a coercive act for which the prosecution should be punished. Indeed, the Supreme Court has observed that within the wealth of caselaw examining the notion of voluntariness, "[t]he significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances."[4] To establish a rule that presumptively deems unrecorded statements as involuntary defies the wee-settled Constitutional principle that the totality of the circumstances of each case must be carefully examined before the exclusionary rule will be applied.

This brings me to my second and third points, which involve the legal presumption of involuntariness and the standard of proof required by the Bill to overcome that presumption. In my thirteen years as an Assistant United States Attorney, and now, in my year and a half as the Attorney General, I have been involved in or supervised the prosecution of **[thousands]** of criminal cases in the District of Columbia. Thus, I can say with much confidence that the existing legal standards, including the Constitutional requirement that the prosecution demonstrate by a preponderance of the evidence that a statement was voluntary, [5] are effective in both protecting defendants and deterring coercive conduct by the police. Accordingly, the presumption of involuntariness, and the clear and convincing standard required under the legislation to overcome this presumption, is unnecessary.

While I recognize that violations do occur, there are numerous safeguards, including the existing Constitutional standards, to protect against such evidence being used. Even before a case is brought, prosecutors in my Office and in the Office of the United States Attorney are required to, and do, screen cases carefully to ensure that Constitutional violations did not occur. If a clear violation is evident, neither Office would use that evidence and both Offices would ensure that any misconduct was properly reported. Beyond that, defense counsel routinely file motions to suppress. Each and every day throughout the Superior Court the Judges hear such motions and, through full evidentiary hearings, carefully scrutinize the actions of our law enforcement officers. As I mentioned earlier, a tremendous body of caselaw serves as the foundation for many of these motions and the subsequent rulings. Moreover, a careful review of the particular facts of each case is undertaken by the Judges to ensure that even the most subtle of differences in circumstances is considered. In these motions, the prosecution must convince the Court, by a preponderance of the evidence, that the statement was voluntary.

The scrutiny does not stop there, however. Indeed, even if the statements made during an unrecorded interrogation are not suppressed by the Judge, juries act as an additional mechanism through which the reliability, accuracy, and voluntariness of such statements are

[3] *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).
[4] *Schneckloth v. Bustamonte*, 412 U.S. at 226.
[5] *Hawkins v. United States*, 304 A.2d 279, 282 (1973).

screened. Defense counsel can, and do, cross-examine police witnesses on the accuracy of those unrecorded statements, and are free to argue that jurors have nothing but the officer's uncorroborated memory on which to rely. Jurors are instructed by the Judge to carefully scrutinize whether such statements were made and assign them the weight that they deserve in light of the evidence of the surrounding circumstances.[6] Moreover, juries must apply the highest standard of all in the law – beyond a reasonable doubt. Finally, trial court decisions are subject to review by the Court of Appeals, providing even greater assurance that any potential missteps along the way can be remedied.

As a prosecutor I would like nothing more than the certainty that comes with recorded statements. The perfect case is the one where the crime, the confession and all witness statements are recorded. However, many things make recording interrogations impractical. First, officers do not always know that the person they are interviewing is a suspect. Second, many people are inhibited by the presence of a camera or other recording equipment and are less likely to speak freely under those circumstances. Third, equipment fails or is not always available. I am aware of only two jurisdictions that have adopted legislation mandating that interrogations of suspects who are in custody be recorded. Both jurisdictions, Texas[7] and Illinois,[8] account for such circumstances by including a number of exceptions in the statutes.[9] Moreover, neither jurisdiction requires that the presumption of inadmissibility be overcome by

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[6] Instruction 2.48 of the Criminal Jury Instructions for the District of Columbia (4th Ed. Revised 2002) states:

"Evidence has been introduced that the defendant made statements to the police about the crime charged. You should weight such evidence with caution and should carefully scrutinize all the circumstances surrounding the making of the statement. Do this in deciding [whether the defendant made the statement and] what weight to give it, along with all the other evidence, when deciding the guilt or innocence of the defendant.

[If you decide that the defendant did make the statement,] in examining the circumstances surrounding the statement, you may consider whether the defendant made it freely and voluntarily with an understanding of what s/he was saying. You may consider whether s/he made it without fear, threats, coercion, or force, either physical or psychological, and without promise of reward. You may consider the conversations, if any, between the police and the defendant. For example, you may consider whether the police warned him/her of his/her rights; where and when the statement was given; the length of time, if any, that the police questioned him/her; who was present; the physical and mental condition of the defendant. You may consider the age, disposition, education, experience, character, and intelligence of the defendant. Considering all the circumstances, you should give his/her statement such weight as you think it deserves."

[7] Tex. Criminal P. Code Ann. § 38.22 .

[8] 705 Ill. Comp. Stat. 405/5-401.5 (effective August 6, 2005) provides for electronic recording of custodial interrogations of minors. 725 Ill. Com. Stat. 5/103-2.1 (effective July 18, 2005) provides for electronic recording of custodial interrogations of adults.

[9] For example, the Illinois statute includes the following exceptions to the recording requirement: (i) statements made in open court proceedings, before a grand jury, or preliminary hearing; (ii) statements made during custodial interrogation that was not recorded because electronic recording was not feasible, (iii) voluntary statements that has a bearing on the credibility of the accused as a witness, (iv) spontaneous statements that are not made in response to a question, (v) statements made after questioning that is routinely asked during the processing of the arrest, (vi) statements made after the suspect requests that the statement not be recorded provided that the statement agreeing to respond to the interrogator's questions is recorded, (vii)statements made during custodial interrogation in another state, (viii) statements given at a time when the interrogators are unaware that death had in fact occurred, or (ix) any other statement that may be admissible under law.

clear and convincing evidence; instead, both legislatures adopted the constitutional standard: a preponderance of the evidence. It is also worth noting that the Illinois legislature made both of its enactments effective two years from the date of passage. Thus, those provisions are not yet in effect.

Although I strongly oppose legislating this practice, should the Council consider enacting B15-1073, I would suggest the following changes to the Bill:

1. Section 103 should be changed to eliminate the presumption that a statement made in contravention to the recording requirements was made involuntarily, and instead, substitute a provision which allows the Court to consider the failure to follow recording requirements as a factor in a motion to suppress a statement on the grounds that a *Miranda* waiver was involuntary[10] or that the statement itself was not voluntarily made. This would resolve our concern that this legislation, as written, establishes an arbitrary and unjustified basis on which to render an entire category of statements involuntary, and would permit the existing Constitutional standards to be applied, along with consideration of the factors laid out in Section 2 of the Bill, in evaluating both types of involuntariness.

2. Amend the Bill to clarify that it applies only to cases investigated by the Metropolitan Police Department. As written, the Bill applies to any case brought in the Superior Court. However, not all cases brought in Superior Court are investigated by District law enforcement agencies. Because this Council, and the District government, cannot require non-District law enforcement agencies to adopt these practices, this law, if enacted, must be limited to cases investigated by MPD. Otherwise, confessions obtained in local D.C. cases that are investigated by the FBI, Secret Service, U.S. Park Police, and surrounding jurisdictions, none of whom are, or can be, required to record interrogations, would be routinely suppressed.

3. Clarify that the recording requirements of Section 2 only apply to custodial interrogations. When a person is in custody due to an arrest and placed in an interview room, it is clear from the onset that the purpose of any interrogation is to obtain a statement that could be used against the person in a criminal prosecution. At these times, police are required to give *Miranda*[11] warnings prior to interrogating a suspect. We have no objection to requiring the recording of both the *Miranda* warnings and the interrogation. Everyday, witnesses come to police stations, either at the request of officers or on their own, and give information to the police. These witnesses are not in custody and are therefore free to leave at any time. During the course of these meetings, officers ask questions and receive responses that become the core of police investigations. Frequently these meetings occur in police

[10] Additionally, the legislation should not alter the existing Constitutional standard whereby a finding of involuntariness of a *Miranda* waiver should only limit the government from using the evidence in the government's case-in-chief. The government should be able to use these statements as rebuttal evidence if the suspect testifies at his trial. A suspect must not be allowed to perjure himself in reliance on the government's inability to challenge his credibility. The Supreme Court's holding in *Harris v. New York*, 401 U.S. 222, regarding statements taken without giving *Miranda* warnings is equally applicable to non-electronically recorded statements under this Bill. "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris,* 401 U.S. at 225.

[11] *Miranda v. United States*, 384 U.S. 436 (1966).

interview rooms. The Bill correctly does not require MPD to record every conversation that the police have with potential witnesses. However, at times a person who voluntarily appears at a police station says something that after further questioning becomes the basis of a statement that may be used against the person in a criminal matter. Without narrowing the applicability of this Bill, the parties will have to litigate, and the court will have to decide, whether the person who made the statement was a suspect at the time that the interview took place. This additional litigation will not aid in the quest to present constitutionally admissible evidence to a finder of fact. By limiting the recording requirements to custodial interrogations, MPD will have a bright line rule telling them when they are required to turn on the recording equipment and the courts and the parties will be spared litigation over whether the person was a suspect at the time that they were interviewed.

4. Section 102(a) requires MPD to electronically record interrogations once the suspect is placed in an interview room and to record all "subsequent contacts between the suspect and law enforcement personnel." However, it is impractical to require MPD to record all contacts between the suspect and the police no matter where or when that contact may occur. After a suspect leaves an interview room the suspect may remain in police custody for a few hours awaiting further processing or transport. The suspect will be in "contact" with the police during this entire time. Obviously, MPD cannot be expected to follow the suspect around with a recording device. Therefore, I suggest that the second sentence of Section 102(a) be amended to state, "Such recording shall commence with the first contact between the suspect and law enforcement personnel once the suspect has been placed in the interview room and shall include all subsequent contacts between the suspect and law enforcement personnel <u>that occur in the interview room</u>."

5. Section 103 should also be amended to address the legal impact of equipment failure and the inadvertent loss of, or damage to, a properly made recording. I suggest that Section 103 include the following language:

"It shall not be considered a violation of Section 2 if:
(1) a law enforcement officer in good faith believes that an interrogation is being recorded and despite this good faith belief the interrogation is not, in fact, recorded, or
(2) the required recording is inadvertently lost or damaged."

6. Finally, I strongly support the inclusion of funding for new and reliable electronic recording equipment to be purchased and installed in police interview rooms, personnel to operate and repair such equipment, and funds to support ongoing police training on conducting interrogations.

Next, I will turn to B15-1071, the Eyewitness Identification Procedure Act of 2004. B15-1071 attempts to legislate best practices for conducting eyewitness identification procedures, including lineups, photo spreads, and showups. The Bill is modeled largely on a portion of a research report issued by the U.S. Department of Justice entitled, "Eyewitness Evidence: A Guide for Law Enforcement."[12] (Hereinafter "the Guide"). However, whereas the Guide

[12] EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT, U.S. Department of Justice, Office of Justice

proposes alternative and flexible protocols for conducting identification procedures, the Bill mandates that certain of those alternatives be required. The Bill then goes beyond the recommendations in the Guide and states that should District of Columbia law enforcement agencies fail to follow the requirements established by this legislation, the prosecution would be burdened by two extra-Constitutional standards including: (1) a presumption that the identification procedure used was unreliable and (2) a burden of proof by clear and convincing evidence to overcome the presumption.

Although the Office of the Attorney General supports the intent of the legislation to ensure that best practices are utilized during eyewitness identification procedures, this policy should be implemented by police general order and additional training, and not legislated. To date, no legislature has adopted such a far-reaching proposal as is contained in this Bill. I strongly oppose legislation, such as this, which would impose a presumption of unconstitutionality and a burden of proof to overcome that presumption which is higher than required by the United States Constitution. Without the passage of B15-1071, the District of Columbia's criminal justice system contains all the necessary elements to ensure that only reliable identifications are admitted at trial. Reducing the determination of reliability to the simplistic approach contemplated by this Bill fails to account for the many elements that presently factor into such determinations under applicable Constitutional law.[13] Moreover, as I will discuss later, the legislation relies on some techniques that are neither validated nor widely accepted as inherently reliable. The legislation also fails to account for other techniques or procedures that are important to law enforcement and that are reliable when conducted properly.

While I recognize that not all identifications are free of suggestivity, there are numerous safeguards, including the existing Constitutional standards, to protect against unreliable evidence being used. As with the scrutiny paid to confessions, prosecutors in my Office and in the Office of the United States Attorney are required to, and do, screen cases carefully to ensure that Constitutional violations did not occur. If a clear violation is evident, neither Office would use that evidence and both Offices would ensure that any misconduct was properly reported. Where there is insufficient evidence in the absence of the identification, the case would be no-papered.

Beyond that, even if a case is brought, as I stated earlier, most defense counsel file motions to suppress and failure to do so when such a motion is warranted may be grounds for appeal. Each and every day throughout the Superior Court the Judges hear motions to suppress identifications and, through evidentiary hearings, carefully scrutinize these procedures for elements of suggestivity and to determine their reliability. As with motions to suppress confessions, a tremendous body of caselaw guides our Judges regarding identification procedures. Moreover, a careful review of the particular facts of each case is undertaken by the Judges to ensure that even the subtlest of differences in circumstances is considered. In some

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Programs, National Institute of Justice, NCJ 178240, October 1999.

[13] "In determining whether an identification is sufficiently reliable**,** the appellate court has articulated five factors to be considered: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witnesses' degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. 188, 201 (1972).

instances, experts may be called to testify regarding the research regarding a particular practice if such research can be validated or otherwise shown to be accepted within the field of expertise. In these motions, the prosecution must convince the Court, by a preponderance of the evidence, that the identification is reliable.

As with statements by defendants, the scrutiny does not stop there. Even if the identifications are not suppressed by the Judge, juries act as an additional mechanism through which the reliability of identifications is screened. Defense counsel can, and do, cross-examine eyewitnesses on the procedures that were used, and the opportunity that they had to view the suspect, including the amount of time, the lighting, the circumstances, the distance, and the like. Jurors are instructed to carefully scrutinize such identifications and assign them the weight that they deserve in light of the evidence of the surrounding circumstances.[14] Moreover, juries must apply the highest standard of all in the law – beyond a reasonable doubt. Finally, trial court scrutiny is subject to review by the Court of Appeals, providing even greater assurance that any potential missteps along the way can be remedied.

In addition to casting aside existing Constitutional standards, this legislation erroneously relies on an arbitrary selection of identification procedures and adopts them as presumptively reliable. As much of the language of the Bill was taken from the Guide, I will spend a few minutes placing it in context prior to addressing specific problems raised by the Bill. First, I should point out for the Committee that the title page of the Guide states, "Opinions or points of view expressed in this document represent a consensus of the authors and do not necessarily reflect the official position of the U.S. Department of Justice." This disclaimer is not mere

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[14] Instruction 5.06 of the Criminal Jury Instructions for the District of Columbia (4th Edition Revised 2002) states:

" The burden is on the government to prove beyond a reasonable doubt, not only that the offense was committed as alleged in the indictment, but also that the defendant was the person who committed it.

In considering whether the government has proved beyond a reasonable doubt that the defendant is the person who committed the offense, you may consider any one or more of the following:

1. The witness' opportunity to observe the criminal acts and the person committing them, including the length of the encounter, the distance between the various parties, the lighting conditions at the time, the witness' state of mind at the time of the offense, and any other circumstances that you deem relevant affecting the witness' opportunity to observe the person committing the offense;

2. Any subsequent identification, failure to identify or misidentification by the witness[es], the certainty or lack of certainty expressed by the witness[es], the state of mind of the witness[es] at the time, the length of time that elapsed between the crime and any subsequent identification, and any other circumstances that you deem relevant bearing on the reliability of the witness' identification; and

3. Any other direct or circumstantial evidence that may identify the person who committed the offense charged or either support or not support the identification by the witness[es].

You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant [and that the defendant is the person who committed this offense] before you may convict him/her. If the circumstances of the identification of the defendant are not convincing beyond a reasonable doubt, you must find the defendant not guilty."

hyperbole. It is notable that in the intervening years since the Guide's release by the Justice Department in 1999, the FBI, Capitol Police, Secret Service, and U.S. Park Police have not adopted the Bill's requirement that identifications be conducted in a double blind, sequential procedure. These federal agencies routinely make arrests in the District of Columbia and continue to follow similar protocols as MPD in conducting lineups, photo spreads, and showup identifications.

Second, the introductory portion of the Guide includes three statements that are noteworthy. The Guide expressly states "no attempt was made to conduct validation studies to state the significance or degree of improvement in eyewitness evidence these practices should be expected to yield."[15] This is a critical point because the legislation under consideration today appears to accept certain procedures as inherently reliable, yet no one has demonstrated this to be true. Further, the Guide acknowledges that "eyewitness identification procedures that do not employ the practices recommended….will not necessarily invalidate or detract from the evidence in a particular case."[16] Finally, the Guide states outright that it "… is not intended to state legal criteria for the admissibility of evidence."[17] Thus, the Guide was never intended to be used as the basis for legislating or otherwise mandating specific identification procedures, much less to establish an extra-Constitutional standard for establishing that an identification procedure is not reliable. In a letter sent to the Judiciary Committee by Mark Larson, a member of the Technical Working Group that drafted the Guide, Mr. Larson observed the following regarding the proposed legislation being considered today:

> The most curious features were the mandatory nature of the bill and the creation of a rebuttable presumption of unreliability if all specified procedures are not followed. To my knowledge, you are the first legislative body to consider such a far-reaching proposal. While I can appreciate the desire to mandate a procedure that promotes reliability, such an aggressive approach would be, in my view, ill advised. **The primary problem with this mechanistic approach is that the research simply does not support it**.[18]

In addition to relying on the Guide, the legislation goes even further and outright mandates certain techniques--presumably as best practices--when even the Guide indicated no preference, or made no reference to the practice at all. Why these techniques were selected as mandatory is not clear. I will highlight a number of these examples below:

1. *B15-1071 Restricts Investigators to Using Sequential Lineups, Which was not Recommended in the Guide*: The Guide recommends best practices for using both sequential and non-sequential lineups. However, it contains a disclaimer that "Although sequential procedures are included in the Guide, it does not indicate a preference for sequential procedures."[19] Mr. Larson explains that, "sequential procedures can be shown, in clinical settings, to reduce the rate of false-positives…

[15] *See* Guide page 8.
[16] *See* Guide page 4.
[17] *See* Guide page 2.
[18] Attached Letter from Mark Larson to Councilmember Kathy Patterson (emphasis added).
[19] *See* Guide page 9.

However, sequential identifications also tend to reduce the rate at which people make correct picks – a highly undesirable goal. Although new meta-analysis research is beginning to explore the relationship of correct picks to false positives, virtually no work has been done in the field to shed more light on this phenomenon. In short, then, the decision to mandate sequential procedures, in all cases, will have the undesired effect of insuring that some cases will not be solved, even though they may have been solved with a different procedure. That may be why the NIJ Guide did not mandate sequential procedures. Sequential line-ups are a practice that should be used and encouraged in appropriate cases – but not, as your Bill requires, in every case."[20]

2. *B15-1071 Requires a Witness to Make a Statement After Seeing Each Person in a Sequential Lineup*: Section 2(4) of the Bill defines the term "sequential lineup" to include the requirement that a witness state "his or her judgment that the person is or is not the suspected perpetrator at that time and before viewing another member of the live line-up or photographic display." Similarly, Section 3(c)(5) requires that a witness to a sequential line-up be instructed to take as much time "as they need with each photograph or live line-up participant before making a determination." While the OAG fully understands and supports the rationale for allowing persons sufficient time to view a suspect, as written, these provisions require that a witness make a statement after viewing each person or photograph. The Guide did not recommend such a procedure, nor am I aware of any validated study that demonstrates that this is a best practice. Indeed, logic would suggest otherwise. A witness who is viewing persons or photographs of persons who have reasonably similar physical characteristics should view all of the choices before voicing a judgment about whether any of the individuals was the perpetrator. Forcing a witness to state an opinion before they are comfortable undermines the identification procedure and should be discouraged.

3. *B15-1071 Requires Double Blind Identification Procedures:* The Bill requires that identification procedures be performed by officers who do not know which individual or photograph of an individual that is shown to a witness is the suspect. The Guide states "blind procedures, which are used in science to prevent inadvertent contamination of research results, maybe impractical for some jurisdictions to implement. Blind procedures are not included in the Guide but are identified as a direction for future exploration and field testing.[21] OAG opposes mandating double blind procedures without evidence that the benefits associated with this procedure outweigh the costs. Law enforcement personnel go to great lengths to develop and foster trust with witnesses. New detectives who are brought in merely to run a lineup or show a photo array will not put the witness at ease and may, instead, impede an accurate identification. This problem is especially acute when dealing with victims of violent crimes and child victims who may freeze up when put in anxiety producing situations. Such a procedure will also require that additional police personnel be utilized both at the time of the procedure, as well as for court proceedings. Therefore, OAG would recommend that the benefits of this procedure be studied before the

[20] Attached Letter from Mark Larson to Councilmember Kathy Patterson.
[21] *See* Guide page 9.

Council approves the additional personnel costs associated with mandating such a procedure.

4. *B15-1071 Needlessly Limits the Use of Show-Up Identification Procedures:* Showups are a useful tool precisely because they occur shortly after a crime was committed when witnesses' recollections are best. In *In re M.A.C.*,[22] the Court of Appeals stated, "While some suggestivity is inevitable in a show-up identification following the commission of a crime, it is recognized that a prompt show-up may enhance reliability of an identification and might exonerate an innocent person who has been apprehended mistakenly." Accordingly, all witnesses should be able to identify or clear a suspect at the earliest opportunity. Contrary to this, and though not recommended in the Guide, Section 5(a) of the Bill arbitrarily limits the use of showup identifications to "exigent circumstances." The use of this term, which has narrowly defined limits in criminal procedure caselaw, necessarily eliminates the use of showup identifications in many circumstances where such a procedure is likely to enhance reliability. Indeed, when a suspect who closely matches the description has been apprehended within close proximity in time and location to the crime, a showup identification is reliable because of its recency to the incident. Additionally, such identifications limit the amount of time that a suspect is detained before probable cause is established and the exclusion of showup procedures in these non-exigent circumstances would needlessly complicate the work of law enforcement, with no apparent benefit to the reliability of the identification. In addition, this limitation would likely preclude the use of a showup when there is a second sighting. As written, Section 5 would only permit a showup when a suspect is located in close proximity in time and place to the crime (5(c)) and under exigent circumstances (5(a)). However, there are situations when witnesses see the perpetrator of a crime days after the event and phone the person's description and location to the police. When the police locate a person matching the description in the second sighting, they conduct a showup to confirm that they stopped the right person. In addition, Section 5(h) states that where there are multiple witnesses and one witness makes an identification during a showup, law enforcement should reserve the remaining witnesses for another identification procedure. This provision may lead to the conviction of the wrong person or, at least, with the true perpetrator avoiding arrest and prosecution. Should the first person to view a suspect at a showup make a misidentification, the remaining witnesses would be precluded from viewing the suspect. These other witnesses may have cleared the suspect by telling the police on the scene that they got the wrong person. Instead, under this provision, the police would retain the witnesses for a future identification procedure. The police, thinking that they had apprehended the perpetrator, would stop canvassing the area and the true perpetrator would get away. Days later, a lineup would be held. If the remaining witnesses state that they were unable to identify anyone, there would be no way to know whether their failure to make an identification was due to time passage, inability to observe, or because the true perpetrator was not in the lineup. What the police and prosecutors would be left with is a positive identification made shortly after the offense and a number of

[22] 761 A.2d 32, 41 (D.C. 2000).

witnesses who, during an initial showup may have exculpated the suspect, but who are now, days later, simply unable to make an identification.

5. *B15-1071 Does Not Permit the Use of Other Reliable Identification Procedures and Requires a Level of Rigor that is Impractical in Law Enforcement:* In addition to drastically limited the use of showup identification procedures, the legislation fails to incorporate a number of other widely accepted techniques. For example, when a witness knows the suspect, the police may use a single photograph simply to confirm that the named individual is the same as the person in the photograph. This practice is widely accepted and viewed as quite reliable when a witness knows the perpetrator,[23] yet it would be presumptively unreliable under this legislation. Additionally, in some of our juvenile cases, investigators may use a school yearbook to conduct an identification procedure when a crime occurred in school. This, too, would be presumptively unreliable as a result of this legislation. Indeed, the Bill contains numerous requirements, the violations of which, no matter how slight, would make the identification procedure presumptively unreliable and inadmissible. For instance, the officer must remember to write down statements on a standard form. The slightest deviation, such as a failure to use the standard form, even if the substitute form contained all of the necessary information, would render the identification presumptively unreliable.

As with B15-1073, my office would be happy to work with the USAO and the District's law enforcement agencies to craft a general order that would support best practices in identification procedures. Moreover, my Office, and, the Office of the United States Attorney, would gladly work with the law enforcement agencies to conduct enhanced training to assure the implementation of best practices in conducting identification procedures. Indeed, it is in everyone's best interest that reliable identification procedures be conducted and the way to ensure that is to develop guidelines for police that: (1) are based on validated research and (2) incorporate the necessary degree of flexibility that law enforcement needs to respond to the different circumstances it faces during investigations. However, reducing the determination of reliability to the simplistic approach contemplated by this Bill fails to account for the many elements that presently factor into reliability determinations under applicable Constitutional law. It takes a determination that should be made by a court and the factfinders on a case-by-case basis, and relegates the totality of the circumstances approach to a legislative formula that is inflexible and not founded on good science. Accordingly, we strongly oppose the legislation.

However, should the Council consider enacting B15-1071, among the changes I would suggest are the following:

1. Section 6 should be changed to eliminate the presumption that an identification procedure, which does not strictly follow the rigid guidelines outlined in the Bill, is unreliable. Instead, we would recommend substituting a provision that allows the Court to consider the failure to follow the Bill's requirements as a factor in a motion to suppress an identification procedure. This would resolve our concern that this legislation, as written, establishes an arbitrary and unjustified basis on which to render

[23] *See Green v. United States*, 580 A.2d 1325 (D.C. 1990).

an identification unreliable, and would permit the existing Constitutional standards to be applied, along with consideration of the factors laid out in the Bill, in evaluating reliability.

2. Amend the Bill to clarify that it applies only to cases investigated by the Metropolitan Police Department. As written, the Bill applies to any case brought in the Superior Court. However, not all cases brought in Superior Court are investigated by District law enforcement agencies. Because this Council, and the District government, cannot require non-District law enforcement agencies to adopt these procedures, this law, if enacted, must be limited to cases investigated by MPD. Otherwise, identifications obtained in local D.C. cases that are investigated by the FBI, Secret Service, U.S. Park Police, and surrounding jurisdictions, none of whom are, or can be, required to adhere to these procedures, would be routinely suppressed.

3. For reasons stated earlier, eliminate the requirement that double blind lineup procedures be used except in exigent circumstances.

4. For reasons stated earlier, eliminate the requirement that lineups be conducted sequentially and, instead, allow for sequential or non-sequential lineups.

5. Allow for greater flexibility in photographic identification procedures, including use of single photographic procedures when appropriate and use of yearbooks and other similar mechanisms for a witness to view photographs when appropriate.

6. Section 4(a) requires every witness who participates in an identification procedure to sign a form that contains five descriptions about how the identification procedure will happen. OAG recommends that Section 4(a) be amended to make it clear that police can give additional warnings to those that are contained in the Bill. For example, the police may want to instruct the witness that individuals depicted in the lineup may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.[24]

7. Section 5(b) should be removed. Section 5(b) states that the police should encourage suspects to voluntarily be detained for participation in a live lineup or consent to being photographed for use in a photo lineup. It is inapplicable to a situation where a witness is transported to view a single suspect. In addition, Section 5(b) would undermine public confidence in police by requiring officers to seek the suspect's consent to be detained or photographed and then detaining the suspect for a showup or photographing the suspect when consent was refused.

8. Remove the parenthetical found in Section 3(h). As written the parenthetical seeks to give examples of characteristics that should be shared by persons contained in photographs or live lineups. However, a photograph cannot show a face and a profile at the same time and cannot be expected to show height, posture, gait, voice, age, skin tone, or specific articles of clothing. Moreover, the examples contained in the

[24] *See* Guide page 32.

parenthetical also run counter to a proposal contained in the Guide. The Guide states, " Consider that complete uniformity of features is not required. Avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers."[25] Mr. Larson notes that this Section "is at complete odds with the NIJ's Guide and current research. The Guide does not require that line-up or montage 'participants have reasonably similar characteristics.' To the contrary, the experts recommend that the participants need not look alike – provided they all match the witnesses' original description of the perpetrator. A key mistake made by many investigators is to have all the participants look too much like the suspect (the clone line-up). Eyewitness experts complain that this may communicate to the witness that the police have focused on a narrow subset of descriptors within the larger group of characteristics that were a part of the original description. Thus, the witness is not being given a fair test and the suspect's features are being unfairly focused on. For this reason, the Bill runs contrary to the Guide and current scientific findings."[26]

9. The Bill contains two provisions that separately defines what a filler in a lineup is. These provisions are found in Section 2(5) and Section 3(h). I recommend that the language pertaining to the characteristics of photographs or live lineups found in Section 3(h) be moved to the definition of a filler in Section 2(5) and that the definition comport with my recommendation above. The newly written Section 2 should read as follows:

   (5)"Filler" means persons placed in a lineup that reasonably resemble the description the witness gave to investigators of the perpetrator. Fillers are expected to reasonably resemble the description of the perpetrator's significant features given by the witness. Suspects should not stand out significantly from fillers used in a lineup.

   Section 3 should be amended to read:

   (h) Investigators must ensure that all photographs or live line-up participants comply with the requirements of Section 2(5). Investigators should examine photographic spreads before presentation to a witness to ensure the suspect does not stand out.

10. Allow for the use of showup identifications when a suspect matching the description is found in close proximity in time and location to the crime, or when a witness reports a second sighting, and eliminate the limitation on exigent circumstances. Additionally, allow all witnesses to view the showup identification, separately.

There are additional changes that I would suggest if the Committee intends to move either Bill to markup. Accordingly, my staff and I would be happy to work with the Committee on those changes. Additionally, as I stated earlier, my Office is fully committed to working closely with the Metropolitan Police Department and the Office

[25] *See* Guide page 29.
[26] Attached Letter from Mark Larson to Councilmember Kathy Patterson.

of the United States Attorney on crafting general orders that would emphasize the use of best practices and in developing and providing training on conducting reliable identification procedures. Indeed, it is in everyone's interest to have a police department that utilizes the soundest practices; but it is in no one's interest to legislate practices that are inflexible, not validated and impractical.

I appreciate the opportunity to testify today and I would ask that my written testimony and attachment be incorporated for the record. I am happy to answer any questions.